No. 10368

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LONG LAKE LUMBER COMPANY and F. D. ROBINSON, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board, herein referred to as the Board, for enforcement of its order issued against respondents pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), herein referred to as the Act. Respondent Long Lake Lumber Company (hereinafter called Long Lake) is a Washington corporation having its principal place of business in Spokane, Washington, where it is engaged in the manufacture and sale of lumber. Respondent F. D. Robinson is an individual engaged in logging operations on behalf

of Long Lake at Caribou Basin, Sandpoint, Idaho, where the unfair labor practices occurred. The Court's jurisdiction is based on Section 10 (e) of the Act.

STATEMENT OF THE CASE

Upon charges filed by International Woodworkers of America, Local Union No. 119, affiliated with the Congress of Industrial Organizations (herein called the Union) and upon the usual proceedings under Section 10 of the Act, fully set forth in the Board's decision (R. 12–16), the Board on August 22, 1941, issued its findings of fact, conclusions of law, and order (R. 11–53; 34 N. L. R. B. 700), which may be briefly summarized as follows:

The business of respondents (R. 16–18).—Long Lake operates two lumber mills in Spokane, Washington, obtaining its logs, in part, from a tract of land at Caribou Basin, Sandpoint, Idaho, upon which it has timber rights (R. 116–117, 469–479). Long Lake's logging operations on this tract are conducted by Robinson (R. 156–157). During 1939 Robinson cut and shipped to Long Lake's mills at Spokane, Washington, approximately 7,900,000 feet of timber (R. 452–453). In 1939 Long Lake sold 50,000,000 board feet of lumber, valued at $600,000, of which between 60 to 75 percent were shipped to customers outside the State of Washington (R. 453, 457, 459–460).[1]

[1] Upon these undisputed facts the Board's jurisdiction over respondents' operations is clear, as respondents concede. See *N. L. R. B. v. Carlisle Lumber Co.*, 94 F. (2d) 138, 141 (C. C. A. 9), cert. denied, 304 U. S. 575; *N. L. R. B. v. Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 21 (C. C. A. 9); *N. L. R. B. v. Weyerhaeuser Timber Co.*, 132 F. (2d) 234, 235 (C. C. A. 9).

The unfair labor practices (R. 18–38).—Respondents shut down the Caribou Basin logging camp and locked out the employees from June 7 to July 11, 1939, in order to prevent organizational activities among the employees and to avoid collective bargaining with the Union, thereby discriminating against its employees in violation of Section 8 (3) of the Act and refusing to bargain collectively with the Union in violation of Section 8 (5) of the Act; respondents at a series of conferences after the shut-down refused to bargain collectively with the Union in good faith, thereby further violating Section 8 (5) of the Act; and respondents by the foregoing and other acts interfered with, restrained, and coerced their employees in the exercise of their rights under the Act, thereby violating Section 8 (1) of the Act.[2]

The Board's order (R. 49–53).—The Board's order, modified as requested at pp. 26–27, *infra,* directs respondents to cease and desist from the unfair labor practices found; upon request, to bargain collectively with the Union; to make whole the employees discriminatorily locked out for the period June 7 to July 11, 1939; upon application to reinstate the employees who the Board found had gone out on strike as a result of respondents' unfair labor practices, with back pay from 5 days after any refusal of their applications made pursuant to the Board's order; and to post appropriate notices.

[2] The pertinent Sections of the Act are quoted in an appendix to this brief (see pp. 29–32, *infra*).

SUMMARY OF ARGUMENT

I. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondents have engaged, and are engaging, in unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act.

II. Both Robinson and Long Lake are employers of the men here involved.

III. The Board's order is valid and proper under the Act.

ARGUMENT

Point I

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondents have engaged, and are engaging, in unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act.

A. The organization of the Union; the precipitate closing of the Caribou Basin camp; the declaration of a strike against the lockout

Soon after the Caribou Basin logging camp was opened for the 1939 season late in the spring of that year, the Union initiated a drive for members among the camp employees (R. 389). A number of employees joined in May and by June 5 a substantial majority of the 93 employees eligible for membership had signed membership application cards designating the Union as their sole collective bargaining agent (R. 397–400). On June 5, Robinson summoned employee Leon Wise, one of the leaders in the Union membership drive, into his office and berated him for his organizing activities, informing him: "Wise, I understand you are organizing for the CIO in this camp, and I understand you passed out four or five cards to men in this camp. Now, if you have, I want to fire you and every damned

man you gave a card to. And if there is another fellow working with you here, I want to get him, too" (R. 235–236). Wise replied that if signing a card would result in discharge, then all the employees "might as well" be discharged, because the camp was "organized 100 per cent" (*ibid.*). Robinson then threatened that he would "just shut the camp down" and lectured Wise about being a "sucker," as he would realize "after J. L. Lewis got a couple of more millions." Wise asked Robinson if he thought "it was fair and square to shut the camp down" when no demands had been made upon him (R. 237). Robinson rejoined that the demands would come later, and warned that he could not "operate with that kind of organization at all" (*ibid.*).

On June 6 a jammer broke down and Robinson laid off the entire crew, which consisted of 4 men who had been among the first to join the Union (R. 238, 397–400, 569–570). Fearing further reprisals, Wise arranged with Union Representative Johnson to hold a union meeting at the camp after work that day (R. 238). While Wise was visiting the bunkhouses notifying the men of the meeting, Robinson accosted Wise and another employee and warned: "Boys, I understand you are holding a meeting in this camp. There will be no God damned meeting held in this camp tonight, or any other time" (R. 239–240, 317). After further conversation, however, Robinson agreed to permit the employees to hold their meeting (R. 240–241, 181–182).

The Union meeting was held, as scheduled. The members formulated demands upon respondents, dis-

cussed grievances, and elected a committee to confer with Robinson (R. 242, 244). Immediately after the meeting, the committee met with Robinson (R. 179–180). Informing him that it was a C. I. O. committee and that the camp was "organized 100%" (R. 180), Johnson asked Robinson if he recognized the committee of the Union as representing the majority of the camp employees. Robinson replied: "Well, what else can I do? They are all there" (R. 242, 320).

The committee and Robinson then proceeded to discuss the employees' grievances (R. 242). Robinson agreed to reinstate the jammer crew that had been laid off earlier in the day as soon as the jammer was repaired (R. 185–186, 242–243, 322). He further agreed to the committee's proposal that in reopening the camp each season or in expanding operations preference be given to former employees, insofar as work which they could perform was available (R. 243–244, 321). Understandings were also reached with respect to a number of other matters concerning living conditions at the camp (R. 246).

Following the meeting with the committee, James Brown, Jr., Long Lake's assistant woods superintendent, arrived at camp and conferred with Robinson (R. 137–141, 184, 249); during the same evening Robinson received two long distance telephone calls from James Brown, Sr., president of Long Lake, at Spokane (R. 665–671). Immediately thereafter Robinson's attitude toward recognition of the status of the Union abruptly changed.

The following morning, June 7, 1939, Robinson, without advance notice, announced that operations were

closed down and directed the men to surrender their rigging and tools, to vacate their bunks, and to obtain their wages (R. 194, 350, 356). Pursuant to these directions the employees proceeded to leave the camp (R. 427).

After leaving the camp the employees met and called a strike in protest against respondents' lockout (R. 250). When Wise informed Brown, Jr., Long Lake's assistant woods superintendent, of the Union action on the same day (*ibid.*), Brown attributed the closing of the camp to Long Lake's decision to assign Robinson to a smaller job in Montana, and explained that the Caribou Basin "job is too large for him; there is too much friction between Mr. Robinson and the camp" (R. 250–251). Brown further informed Wise, "Our mill [in Spokane] is organized, you could have got together here and formed a Union of your own and we would have helped you; * * * We get along fine with the men in the mill and never have any trouble and we could have got along the same here, but you fellows didn't realize the kind of organization you have joined; you could not have done worse; even the A. F. of L. would have been better than the thing you got into" (R. 253). After some further conversation Brown, Jr., remarked that during the past year he had investigated various labor organizations and had come to the conclusion that "we cannot operate with your kind of organization, and we will shut her down" (R. 253). When Employee Finley and his working partner turned in their rigging and tools and inquired "what was going on," they were told by either

Robinson or Brown, Jr., that the camp was shut down because of additional demands made by the Union that morning (R. 661, 688). Brown, Jr., added, significantly, "we have a union in Spokane. Our mills are organized by local fellows. If you fellows had an organization of that kind amongst yourselves, we would recognize that sort of a union" (*ibid.*). Later Robinson encountered Employee Frank Mor in a saloon at Sandpoint and said to him, "That is what you are down here for, because you signed up with the C. I. O." (R. 402), thus plainly inferring that he was in town and not at the camp at work because he was a member of the Union.

B. The Union's abortive efforts to bargain with respondents subsequent to the lock-out; the posting of pickets on the road leading to the camp; the resumption of operations

On June 15, while the lock-out was still in effect, the Union filed unfair labor practice charges against respondents with the Board (Bd. Exh. No. 1). On several occasions during the latter part of June, the Union met with respondents in the presence of a representative of the Board in an effort to arrange for the resumption of logging operations and the reinstatement of the employees (R. 203, 205). In order to dispel any doubts respondents may have had with respect to the Union's majority status, the union representatives repeatedly offered its membership application cards for a check against respondents' June 5 pay roll (R. 257–258). At one meeting Hunt, attorney for Robinson, began to check the cards against the pay roll. When, however, after questioning the authenticity of the signatures and suggesting that the

cards may have been signed under duress, he began to prepare a list of the names on the cards, the Union declined to permit him to continue the check (R. 211–212, 259, 282–283). Thereupon the Union proposed that the Board check the Union's membership cards as of a date preceding the lock-out, agreeing that if such an audit did not affirm the majority status of the Union, it would refrain from picketing or other forms of economic action (R. 205, 207–208, 260–261). Although the parties orally agreed to these proposals (*ibid.*), Robinson refused to reduce the agreement to a signed stipulation (R. 261). It was then suggested that the parties write letters to the Board's Regional Director incorporating these agreed provisions (R. 262). Letters were drafted but not exchanged; Robinson refused to abide by the results of a check of the Union's membership as against the June 5 pay roll, insisting instead that the check be made as of a date subsequent to the resumption of work (R. 458–459). This proposition was unacceptable to the Union (R. 262).

Subsequently the Union Committee met with Robinson in the absence of Attorney Hunt and Union Representative Johnson (R. 215). At this meeting Wise handed the union membership cards to Robinson and urged him to check them against the pay roll (R. 298, 590); Robinson refused, stating, "Boys, I have agreed to meet with you but I am not saying a word; I am not allowed to say anything. You talk all you want to and as long as you want to, and I will sit here and listen

to you. I am not saying a word; my hands are tied" (R. 267, 298, 684).

At the last meeting between the Union committee and Robinson, which Attorney Hunt and Union Representative Johnson also attended, the parties discussed the conduct of a consent election to be supervised by the Board. The Union contended that the election should be held as soon as possible; Robinson maintained that such an election take place after the reopening of the camp and the resumption of operations (R. 215). The meeting concluded with the understanding that the camp would be reopened on July 5, and that an election would take place on July 6 (R. 573). When the men, however, reported at the camp for work pursuant to this understanding, arrangements for the resumption of operations had not been made (R. 293–294). The election was not held and the Union, on the morning of July 6, posted a picket line on the road leading to the camp (R. 293).

On July 11, Robinson, together with Sheriff Rapp and other law enforcement officers, appeared at the entrance to the camp road with a group of men prepared to go to work. When the men, however, revealed their union affiliation and refused to go through the picket line (R. 411–412, 273), Sheriff Rapp suggested that they "try to get together with Frank [Robinson] and try to settle the thing?" (R. 274). Union Representative Johnson proposed an immediate check of union membership; Robinson rejected the proposal, reiterating that he would not recognize the

Union (R. 274–275, 685).[3] He offered, however, to reemploy all the striking employees. Johnson refused the offer on the ground that the men would not return to work unless Robinson recognized the Union (R. 576).

On July 14, Robinson again appeared at the picket line with a newly recruited crew of men and in the presence of State police passed through the picket line. Shortly thereafter, the camp resumed operation (R. 577).

C. The illegality of respondents' conduct under the Act

1. *Respondents' violation of Section 8 (3) and (1) of the Act*

The foregoing findings amply warrant the Board's conclusion (R. 29, 31–32) that respondents shut down the camp and locked out the employees in order to discourage union membership and activities and to avoid their obligation to bargain collectively. Robinson's unconcealed hostility to the Union, as evidenced by his threats to discharge Wise and his associates in the Union and his threat to "shut the plant down"; Long Lake's manifest desire to eliminate the Union, as indicated by Assistant Woods Superintendent Brown's frank comments to Wise that he "could not have done any worse" than to join the Union, and his suggestions with respect to the formation of "a union of your own"; and the timing of the shut-down, immediately after the Union organizing activities appeared suc-

[3] During this same period Robinson informed Fred Chaney, an employee, that he would not recognize the Union, that "he would kill the damned Union" (R. 420).

cessful and respondents were confronted with the necessity of dealing with the Union, all amply support the Board's conclusion that the lock-out of June 7, 1939, constituted an unfair labor practice.

Respondents' contention before the Board that the shut-down was necessitated by excessive precipitation, making it impossible to operate their trucks, finds no support in the record, as the Board concluded (R. 29). Although the precipitation in June of a previous year, 1937, greatly exceeded the rainfall in June 1939, and curtailed logging operations, nevertheless the camp was not closed during that season, as Bookkeeper Davis admitted; instead, the men remained in camp (R. 651–652, 581–584).[4]

Moreover this reason for the shut-down was advanced by respondents for the first time at the hear-

[4] Moreover, the actual records as to rainfall in the vicinity of the Caribou Basin do not bear out respondents' claim that there had been excessive precipitation in June *prior* to the shut-down. While there was an excessive amount of rainfall in the month of June 1939, as a whole, the great bulk of this rain fell *after* the camp was closed. Thus, the records of the United States Department of Agriculture Forest Service Experiment Station at Priest River, approximately 12 miles from the camp, show that in the entire month of May and the first 6 days in June only .97 of an inch of rainfall was recorded while 2.81 of an inch was recorded in the remaining 24 days in June (R. 614–615, 622–623). The records of the nearby Idaho State Agricultural Station at Sandpoint show only .92 of an inch of precipitation for the entire month of May and the first 6 days in June, while during the rest of the month of June, following the shut-down, 2.52 inches of rain fell (R. 601–603). The average amount of rain falling in June at the Sandpoint Station is 1.59 inches (R. 604). It is thus evident that the decision to close the camp was reached upon the basis of much less than the average June rainfall.

ing. Assistant Woods Superintendent Brown in his lengthy conversation with Wise on the afternoon of the shut-down did not attribute the shut-down to excessive rainfall, but rather to Long Lake's difficulties with Robinson and the "friction" Robinson was having with the men (*supra,* p. 7). Similarly as noted at pp. 7–8, *supra,* statements that Robinson and Brown made to Employees Wise, Finley, and Mor subsequent to the shut-down referred to union activity as the motivating reason therefor rather than excessive precipitation, and thus fully confirm the conclusion that the shut-down was due to respondents' determination not to deal with the Union.

Under all the circumstances the Board's conclusion (R. 31–32) that "respondents shut down the camp on June 7 in order to prevent organizational activities among the employees and collective bargaining with the Union, and that by such action they discriminated in regard to the hire and tenure of employment of the employees * * * who were locked out of the camp because of the shut-down, thereby discouraging membership in the Union" in violation of Section 8 (3) and (1) of the Act is compelled by the record. *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 658; *Republic Steel Corp.* v. *N. L. R. B.,* 107 F. (2d) 472, 475 (C. C. A. 3), enf'g 9 N. L. R. B., 219, 402–403; *Reliance Mfg. Co.* v. *N. L. R. B.,* 125 F. (2d) 311, 319 (C. C. A. 7), enf'g 28 N. L. R. B. 1051, 1173; *N. L. R. B.* v. *Somerset Shoe Co.,* 111 F. (2d) 681, 688–689 (C. C. A. 1); *N. L. R. B.* v. *Crystal Spring*

Finishing Co., 116 F. (2d) 669, 672 (C. C. A. 1); *N. L. R. B.* v. *Mall Tool Co.,* 119 F. (2d) 700, 701–702 (C. C. A. 7); *N. L. R. B.* v. *Hopwood Retinning Co.,* 98 F. (2d) 97, 100 (C. C. A. 2). The lockout, the Board found (R. 27, 44–45), continued in effect until July 11, 1940, when Robinson offered to reinstate the employees and respondents were prevented from reopening the camp because of the strike and the picket line.[5]

2. Respondents' violations of Section 8 (5) and (1) of the Act

The Board further found (R. 34–35) that respondents' action on June 7, 1939, in shutting down the camp in order to avoid further bargaining with the Union "was tantamount to a refusal to bargain with the Union on that date" and that its action thereafter in persistently placing "every obstacle in the path of the Union's attempts to show a majority * * * was not the result of honest doubt as to the Union's designation as bargaining agent by a majority of the employees, but was motivated, on the contrary, by a desire to delay and prevent bargaining negotiations." Respondents' conduct on June 7 and thereafter, the Board concluded (R. 36–37, 48–49), constituted a refusal to bargain collectively in violation of Section 8 (5) and (1) of the

[5] Taking cognizance of the fact that the employees refused Robinson's offer of reinstatement, the Board held (R. 44–47) that respondents' obligation to back pay because of the lock-out terminated as of July 11, 1939, and that the employees thereafter, as strikers, were entitled only to reinstatement upon their application.

Act. The propriety of this conclusion is not open to question.[6]

Respondents' entire course of conduct was consistent only with a complete rejection of the collective bargaining process. Not only did respondents seek by threats and other anti-union conduct to prevent the employees from organizing and bargaining through the Union (*supra*, pp. 4–5, 7–8), but on the morning immediately following the first request for collective bargaining, respondents took the unprecedented action of closing the camp and locking out all the employees. Such wholesale discrimination aimed to discourage the employees' adherence to the Union constituted just as unequivocal a rejection of the collective bargaining process as an outright and direct refusal to bargain collectively. The Board thus properly concluded that respondents' action in shutting down the camp on

[6] The Board's determination (R. 32–33) that the employees at respondents' Caribou Basin camp, excluding supervisory officials, foremen, and clerical and office employees, constituted an appropriate collective bargaining unit is wholly reasonable. Respondents do not contest the appropriateness of the unit found by the Board.

The Board's finding (R. 33–34) that on June 6, 1939, and at all times thereafter, the Union represented a majority of the employees in the appropriate unit is amply supported by the evidence. There were 93 employees in the appropriate unit as of June 6, 1939, as shown by the June 5 pay roll and testimony as to changes occurring on June 6 (R. 374–382; see R. 33, n. (6) and Typewritten Transcript 1096–1097, 1100). Signed membership application cards introduced into evidence establish that 51 of the 93 employees in the appropriate unit had designated the Union as their "sole collective bargaining agent" on or before June 6, 1939, and that subsequently 15 additional employees similarly designated the Union as their bargaining agent (R. 390–400).

June 7, 1939, constituted a refusal to bargain on that date. *N. L. R. B.* v. *Crystal Spring Finishing Co.*, 116 F. (2d) 669, 672 (C. C. A. 1). Cf. *N. L. R. B.* v. *Piqua Munising Wood Products Co.*, 109 F. (2d) 552, 555 (C. C. A. 6); *N. L. R. B.* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 686 (C. C. A. 1).

Respondents' conduct subsequent to the lock-out is equally inconsistent with the fulfillment of their obligations under Section 8 (5) of the Act. When requested to bargain collectively with the Union, respondents, if they honestly doubted the Union's majority status, had the duty to cooperate with the Union in its efforts to prove its right to represent the employees. *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 868–869 (C. C. A. 2), cert. denied 304 U. S. 576; *N. L. R. B.* v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756, 757 (C. C. A. 2); *N. L. R. B.* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 688 (C. C. A. 1); *Lebanon Steel Foundry* v. *N. L. R. B.*, 130 F. (2d) 404, 409 (C. A. D. C.), cert. denied 63 S. Ct. 58; *N. L. R. B.* v. *Piqua Munising Wood Products Co.*, 109 F. (2d) 552, 557 (C. C. A. 6); *N. L. R. B.* v. *New Era Die Co.*, 118 F. (2d) 500, 504 (C. C. A. 3); *N. L. R. B.* v. *Moltrup Steel Products Co.*, 121 F. (2d) 612, 618 (C. C. A. 3); *N. L. R. B.* v. *Texas Mining & Smelting Co.*, 117 F. (2d) 86, 88 (C. C. A. 5); *Solvay Process Co.* v. *N. L. R. B.* 117 F. (2d) 83, 86 (C. C. A. 5); *N. L. R. B.* v. *Schmidt Baking Co.*, 122 F. (2d) 162, 164 (C. C. A. 4); *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 788 (C. C. A. 9), cert. denied 312 U. S. 678; *N. L. R. B.* v. *Bradford Dyeing*

Association, 310 U. S. 318, 339. The Board found (R. 35–36) that respondents were not interested in receiving such proof but rather in avoiding acceptance of the various methods proposed. Thus Hunt, attorney for Robinson, utilized the membership application cards proffered by the Union to prove its majority status, to prepare unnecessarily a list of union members (*supra,* pp. 8–9). Robinson flatly took the position that he could not check the union cards, that "[his] hands [were] tied" (*supra,* pp. 9–10). Also, as we have seen (*supra,* pp. 9–10), respondents persistently sought to have the Union establish its majority status as of a date subsequent to the lock-out, when the consequences of union affiliation had been forcefully brought home to them.[7] And when Union Representative Johnson proposed a check of union membership on July 11, 1939, when Robinson attempted to take some men through the picket line, Robinson flatly refused to recognize the Union (*supra,* pp. 10–11). The Board was thus fully justified in finding (R. 36–37) that respondents' conduct subsequent to the shut-down also constituted a refusal to bargain

[7] Respondents, as the Board found (R. 43), were obligated to bargain collectively with the Union upon the basis of its status prior to the lock-out. It is, of course, well settled that respondents, may not take advantage of any changes in the personnel of the bargaining unit brought about by the shut-down, since the shut-down was an unfair labor practice not only within the meaning of Section 8 (3) and (1) of the Act, but 8 (5) of the Act, as well. *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 340; *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 82; *N. L. R. B.* v. *P. Lorillard Co.*, 314 U. S. 512, 513; cf. *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 197–198.

collectively in violation of Section 8 (5) and (1) of the Act and that the strike was prolonged after July 11, 1939 because of respondents' refusal to recognize and bargain collectively with the Union.[8]

Point II

Both Robinson and Long Lake are employers of the men here involved

As noted above (*supra,* p. 2), Long Lake's logging operations on the tract of land on which it has timber rights at Caribou Basin are carried on by Robinson. When Long Lake commenced logging on the Caribou tract, Robinson was engaged to build the road and the camp itself, the buildings becoming the property of Long Lake (R. 156–160, 163, 176). Since that time Robinson has conducted logging operations on this tract in accordance with an arrangement with Long Lake which is terminable upon 30 days' written notice, whereby Robinson maintains the camp and cuts and loads on cars for delivery to Long Lake various kinds of logs at specified prices, the quantity

[8] Robinson's threats to "fire" Wise because of his union activities, his threats to "shut the camp down" if the Union organized it, his derogatory remarks concerning the Union and the national organization with which it is affiliated, his remarks openly attributing the shut-down to the activities of the Union, and Assistant Woods Superintendent Brown's frank comments that the men "could not have done any worse" than to join the Union, his statement that Long Lake could not "operate with your kind of organization," and his other remarks favorable to the formation of "a union of your own" and hostile to the Union, all disclosed a pattern of hostility constituting, as the Board found, interference, restraint, and coercion and an independent violation of Section 8 (1) of the Act (R. 37–38).

and time of delivery being determined by Long Lake (R. 123, 130–132, 147–156, 503, 504).[9] While nominally Robinson is the employer of the men working at the camp, in actual practice Long Lake furnishes the funds not only to meet the pay roll but to meet other operating expenses as well. Thus, each month Robinson sends the pay roll to Long Lake and receives funds to meet it (R. 164); Robinson also requisitions funds to meet other expenses (R. 578–579, 646–647, 169–170).[10] Thus, Long Lake exercises a considerable degree of control over Robinson's operations. Not only is the agreement with Robinson terminable upon 30 days' notice, but Long Lake does not bind itself to take any specified quantity of logs, reserving to itself the right not only to determine the quantity of logs acceptable but also the time of delivery as well. And in actual practice the maintenance of operations at the camp depends entirely upon the continued furnishing of funds by Long Lake. The arrangement plainly leaves Robinson little room for independent action.

Moreover, Long Lake exercises general supervision over the operations performed in the camp. Long Lake's assistant woods superintendent, James M. Brown, Jr., according to his own admission, spends half of his time at the camp checking whether the

[9] A letter from Long Lake to Robinson dated January 26, 1939, indicating the rates to be paid by Long Lake for the various types of logs during the 1939 season, serves as a memorial of the agreement in effect in 1939 (R. 502–504).

[10] In 1939, as a result of operating on this basis for preceding years Robinson, according to Long Lake's records, had become indebted to Long Lake in the sum of $24,924.06 (R. 503).

men "fall" the timber properly and supervising compliance with the brush disposal regulations and fire laws (R. 120, 124–125, 128–130, 133–135, 149–152). Admittedly, if he observes infractions of the law or Company regulations, he makes appropriate complaints to the straw boss on the scene and reports it to Long Lake at Spokane (R. 124–125, 128). Brown also advises Robinson with respect to the section to be cut and checks to determine whether Robinson is conducting the logging operations in accordance with the provisions of Long Lake's contract with the Humbird Lumber Company, the owner of the Caribou Basin tract (R. 154–155, 158–159). Long Lake's Woods Superintendent Breen from time to time visits the camp and assists direction of the work. In August 1939, Breen assisted in the construction of a dam at the camp and directed the men in Robinson's absence (R. 217–219).

The Board found (R. 39–40), that "in addition to exercising general supervision over the work of employees engaged in the logging operations, Long Lake also controlled, to a large extent, Robinson's relations and dealings with said employees" and actually "participated" in the unfair labor practices here involved. On June 6, 1940 when Robinson conferred with the committee, alone, he not only conceded the Union's right to exclusive recognition but he came to an agreement with the Union concerning the settlement of certain outstanding grievances, and the prospect of harmonious relations between Robinson and

the Union appeared promising. However, after the arrival of Brown, Jr., upon the scene and after the receipt of two telephone calls from Brown, Sr., Long Lake's president (*supra,* p. 6), Robinson abruptly closed down the camp and locked out the employees. Upon these facts the Board was plainly justified in finding, as it did (R. 41), that "both Robinson's decision to shut down the camp and his persistent refusal thereafter to recognize the Union * * * were the result of instructions received from Long Lake." Long Lake's participation in Robinson's decision to shut down the camp and his change in attitude toward collective bargaining with the Union thereafter, are also evidenced, as the Board pointed out (R. 40–41), by Brown's statement to Employee Finley to the effect that if the employees had an organization of "local fellows * * * we would recognize that sort of a union" (*supra,* pp. 7–8), and his announcement to Wise, the mainspring of the Union, that Long Lake could not operate "with [his] kind of organization, and we will shut her down" (*supra,* p. 7). Robinson's frank admission at one of the conferences with the Union committee that he had agreed to meet with the committee but that he was "not allowed to say anything," that his hands were tied (*supra,* pp. 9–10), strikingly reveals the extent to which Long Lake controlled Robinson's relations with the Union.

Under all the circumstances, the Board's conclusion that Long Lake participated in the unfair labor prac-

tices herein involved and was and is an employer of the employees at Caribou Basin, within the meaning of Section 2 (2) of the Act was clearly permissible. Precisely in point is the decision of this Court in *N. L. R. B.* v. *Grower-Shipper Vegetable Association,* 122 F. (2d) 368, 377–378, directing a group of grower-shippers who had participated in a scheme of discrimination against 10 employees to reinstate them with back pay, notwithstanding the objection of some of the grower-shippers that they had never been employers of the employees in question.

Similarly in *N. L. R. B.* v. *Condenser Corp.,* 128 F. (2d) 67 (C. C. A. 3), the Court sustained an order against two affiliated corporations, one, Cornell, a purchasing and sales corporation, and the other, Condenser, a manufacturing corporation, despite the objection that the Cornell corporation was not the employer of the employees in question. In holding that the order redressing unfair labor practices against Condenser's employees was properly directed to both corporations the Court stated (at p. 71), in language strikingly apposite here:

> This is in no sense a penalty against the parties for an arrangement which is deemed by them to be in the interests of efficiency. It simply rests on the premise that where in fact the production and distribution of merchandise is one enterprise, that enterprise, as a whole, is responsible for compliance with the Labor Relations Act regardless of the corporate arrangements of the parties among themselves.

What is important for our purpose is the degree of control over the labor relations in issue exercised by the Company charged as a respondent. Press Co., Inc. v. *N. L. R. B.,* 118 F. (2d) 937 (C. A. D. C. 1940). Regardless of what Cornell says concerning its connection with Condenser's employees *it appears that "together, respondents act as employers of those employees * * * and together actively deal with labor relations of those employees." N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 263 (1938). Evidence of this is abundant * * * it will suffice at this time to point out that Cornell's officers were very active in dominating the original local union, Independent, and again, in bringing negotiations with that group's successor, Brotherhood, to a culmination. It is noteworthy, too, that the reinstatement of some of the men first discharged was arranged with Cornell's president, Mr. Blake. This and similar evidence is controlling in our disposition of the question of Cornell's status as an employer. As has been said, "* * * the problem is not to be approached from the standpoint of vicarious liability." *Consolidated Edison Co. of New York, Inc.* v. *N. L. R. B.,* 95 F. (2d) 390, 394 (C. C. A. 2, 1938, modified on another point, and affirmed 305 U. S. 197 (1938). *It is rather a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers.* [Italics supplied.]

In *Butler Brothers* v. *N. L. R. B.*, decided March 31, 1943, 12 L. R. R. 287 (C. C. A. 7), Butler Brothers had contracted with one Wasleff, an individual engaged in the building maintenance business, to have him handle, on a contractual basis, the building maintenance work formerly performed by Butler Brothers itself. The Board found that nothwithstanding this arrangement, Butler Brothers retained ultimate control over these maintenance employees who were nominally in the employ of Wasleff and that Butler Brothers, therefore, assumed jointly the role of employer of such employees within the meaning of Section 2 (2) of the Act. The Board, finding that the rights of these maintenance employees under the Act had been interfered with and that nine of them had been discriminated against because of their union membership and activities, directed its order against both Wasleff and Butler Brothers. The Court, upon the basis of "the amount of control" exercised by Butler Brothers over the employees of Wasleff, rejected Butler Brothers' contention that Wasleff, an independent contractor, was the sole employer of the employees in question and held that the Board could properly direct its order against, and require compliance of, both Butler Brothers and Wasleff, irrespective of the precise technical nature of the relationship between the two parties.

In view of the foregoing decisions there can be no doubt as to the propriety of the Board's action in holding Long Lake jointly with Robinson as the employer

of the men at the Caribou Basin camp and in entering an order against both.[11]

Point III

The Board's order is valid and proper under the Act

Paragraphs 1 (a) and (b) of the Board's order (R. 50) directing respondents to cease and desist from their unfair labor practices are mandatory under Section 10 (e) of the Act. *N. L. R. B.* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 265. In view of respondents' independent violations of Section 8 (1) of the Act, as well as the discriminatory lock-out of all their employees and the refusal to bargain collectively with the Union, paragraph 1 (c) of the Board's order (R. 50) requiring respondents to cease and desist from "in any other manner interfering with, restraining, or coercing their employees" is plainly a proper safeguard against the "threat of continuing and varying efforts to attain the same end in the future" which is implicit in respondents' varied misconduct in the past. *N. L. R. B.* v. *Express Publishing Co.,* 312 U. S. 426, 438; *N. L. R. B.* v. *Hollywood-Maxwell Co.,* 126 F. (2d) 815, 819 (C. C. A. 9); *N. L. R.*

[11] See also the following cases in which Board orders against affiliated corporations have been sustained over the objection of one of the affiliates that it was not an employer of the employees in question: *Bethlehem Steel Co.* v. *N. L. R. B.*, 120 F. (2d) 641, 648–650 (C. A. D. C.); *N. L. R. B.* v. *Swift & Co.*, 127 F. (2d) 30, 43 (C. C. A. 6); *Union Drawn Steel Co.* v. *N. L. R. B.*, 109 F. (2d) 587, 589–590, 594–595 (C. C. A. 3); *N. L. R. B.* v. *Gerity Whitaker Co.*, 10 L. R. R. 494 (C. C. A. 6), cert. denied 63 S. Ct. 663, enforcing 33 N. L. R. B. 393, 425. Cf. *N. L. R. B.* v. *Adel Clay Products Co.*, 134 F. (2d) 342 (C. C. A. 8).

B. v. *Pacific Gas and Electric Co.,* 118 F. (2d) 780, 789 (C. C. A. 9); cf. *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 660 (C. C. A. 9).

Paragraph 2 (a) of the Board's order (R. 51) directing respondents upon request to bargain collectively with the Union, the usual order entered upon findings of a refusal to bargain, is of established validity.

Paragraph 2 (b) of the Board's order (R. 51) provides for the reinstatement with back pay of the employees who were locked out and who thereafter declared a strike in protest against respondents' unfair labor practices. The Board in paragraph 2 (b) of its order inadvertently directed that respondents offer reinstatement to the unfair labor practice strikers, with back pay from 5 days after the date of the Board's order. To correct this inadvertent error and to relieve respondents of the more onerous requirements of paragraph 2 (b) as written, it is respectfully requested that paragraph 2 (b) be modified to require respondents to offer reinstatement to the striking employees only upon their application and to pay back pay only from 5 days of any refusal of reinstatement or placement upon a preferential list.[12] Paragraph 2

[12] Paragraph 2 (b) of the Board's order would then read:

"(b) Upon application offer to the employees listed in Appendix A immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, in the manner set forth in the section entitled 'The remedy' above, placing those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section; and make whole said employees for any loss of pay they may suffer by reason of

(b), as so modified, is the normal remedial provision entered in cases where strikes are caused or prolonged by unfair labor practices. The propriety of such provisions has been uniformly sustained by the Courts. *N. L. R. B.* v. *Montgomery Ward & Co.,* 133 F. (2d) 676 (C. C. A. 9); *N. L. R. B.* v. *Grower-Shipper Vegetable Association,* 122 F. (2d) 368, 378 (C. C. A. 9); *N. L. R. B.* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9), cert. denied 304 U. S. 575; *N. L. R. B.* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18 (C. C. A. 9); *Republic Steel Corp.* v. *N. L. R. B.,* 107 F. (2d) 472, 478 (C. C. A. 3), cert. denied on this point 309 U. S. 684.

The validity of paragraph 2 (c) of the Board's order (R. 51–52) directing respondents to reimburse the employees whom it discriminatorily locked out of the Caribou Basin camp for the sums they would have earned from June 7, 1939, the date of the lock-out, to July 11, 1939, when they declined respondents' offer of reinstatement, is not open to question. Section 10 (c) of the Act specifically includes back pay as an "illustration" of one form of remedial action available to the Board upon findings of unfair labor practices. *Phelps Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177, 189. Of equally settled validity is paragraph 2 (d) of the Board's order (R. 52), requiring respondents to post appropriate notices.

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any refusal of reinstatement or placement upon the preferential list, by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from five (5) days after the date upon which he applied for reinstatement to the date of the offer of reinstatement or placement upon the preferential list, less his net earnings during said period."

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that the order directed against both Robinson and Long Lake, modified as requested herein, is wholly valid, and that a decree should issue affirming and enforcing said order.

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MAY 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home or any individual employed by his parent or spouse.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to ar-

range terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit ap-

propriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so

modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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